Supreme Court, U. S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1979

No. 79-449

JOSEPH TURCIO, *Petitioner*

v.

STATE OF CONNECTICUT, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

JOSEPH TURCIO,
Petitioner

V.

STATE OF CONNECTICUT,
Respondent

Petition For A Writ Of Certiorari To The Supreme Court For The State Of Connecticut

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court for the State of Connecticut entered in this proceeding on June 26, 1979.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at XL Conn. L. J. No. 52

at 4 (June 26, 1979) and appears in Petitioner's Appendix. The unreported memorandum of the trial judge denying Petitioner's motion to suppress his confession and admissions also appears in Petitioner's Appendix.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on June 26, 1979. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED
FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

QUESTIONS PRESENTED

1. Whether at Petitioner's murder trial the Court's jury charge that the testimony of Petitioner's family, friends and former attorney should be weighed with "particular care" denied Petitioner due process of law, effective assistance of counsel, a fair trial and acted to shift to him the burden of proof.

2. When the sixteen (16) year old Petitioner did not consult with an attorney or other adult interested in his welfare before he waived his Miranda rights, and when the police failed to advise any adult interested in Petitioner's welfare of Petitioner's Miranda rights before securing a waiver of those rights, did the court err in not suppressing Defendant's confession and admissions to the crimes of murder and assault?

STATEMENT OF THE CASE

On March 5, 1975, the owners of Frank's Market on Foxon Road in East Haven, Connecticut, Frank and Jean Massaro, were shot after closing their store at 8 p.m. (T. at 103, 156-159, 205-206). Mr. Massaro was killed and his wife wounded. A cigar box containing the day's receipts from the store was taken by the assailant. (T. at 1033). On the date of the crime the Defendant, Joseph Turcio, Jr., was sixteen (16) years of age. (T. at 1175).

At 7:45 p.m. on March 5th, the Defendant was picked up by Robert McKiernan while hitchhiking. (T. at 273-274). While in the car, the Defendant stated that he was going to rob Frank's Market and he wanted his companions to wait until he came out. (T. at 276). McKiernan did not take the Defendant seriously, dropped him off at the market and then drove off. (T. at 276). The Defendant then entered the store, made a purchase and left. (T. at 1034).

At 8 p.m. the Massaros were closing their store. Mrs. Massaro, called as a witness for the State, then related what occurred. She went to their car first, carrying a cigar box containing the money. (T. at 1028). After she and her husband got into the car, she heard the back door of the vehicle open and saw a person enter pointing a gun between her and her husband. (T. at 1031). She turned, saw the person's face, opened the car door and ran around the car screaming. (T. at 1031). She was then shot in the back, fell to the ground and heard another shot and saw her husband fall. (T. at 1032). The assailant then picked up the cigar box and ran. (T. at 1033). He had come into her store before and she knew he lived nearby. (T. at 1034). The witness then made an in-court identification of the Defendant as the person who shot and robbed her and her husband on March 5, 1975. (T. at 1036).

At approximately 8:15 p.m. the Defendant appeared at the home of Bartholomew Mansi, Jr. who resided a few blocks from Frank's Market. (T. at 361). The Defendant asked for Mansi's son. (T. at 368). When he was told he was not at home, the Defendant left. (T. at 370-372). Mr. Mansi observed an ammunition box in the Defendant's pocket. (T. at 368).

Thereafter, the Defendant waved down a car operated by Fred Melillo. Richard Greenspun was a passenger in the car. (T. at 417, 490). The Defendant was carrying a small object, like a box, according to Melillo. (T. at 418, 490). The Defendant got into the back seat. Both Melillo and Greenspun testified to substantially the same effect that the Defendant asked for a ride to New Haven, (T. at 419, 456, 491) which would require them to pass Frank's Market. (T. at 419). The Defendant told Melillo to make a turn (T. at 421, 491, 492) eliminating the need to pass the market. (T. at 422). While in the car, the Defendant "mumbled something about dropping his bullets and something like 'I hope I killed him.'", (T. at 428) and "I wish I wore a mask" (T. at 493). While en route to New Haven, the Defendant said he wanted to put something back at his uncle Michael Liso's house, and Melillo then headed in that direction. (T. at 430, 461). At his uncle's, the Defendant got out (T. at 431, 483, 493) and asked Melillo to wait, but he decided to leave. (T. at 432, 484). After the Defendant left the car, Greenspun found a cigar box containing money. (T. at 432, 495).

Between 9:00 and 9:30 p.m., the Defendant was again hitchhiking, this time on Route 80 in East Haven. He was picked up by Domenic DeLucia (T. at 679), who noticed that the Defendant had in his possession certain items taken in a burglary of his home in the morning hours of March 5th. (T. at 680-683). DeLucia took the Defendant to his home, called the police, who arrived, arrested the Defendant and took him to the police station. (T. at 683-691, 705).

The Defendant was a suspect in the incident at Frank' Market before the police's arrival at the DeLucia home. Mrs. Massaro had told them that the person who shot her and her husband was "the boy up the street, whose mother is a crossing guard" (T. at 58, 105, 167) and who Mrs. Massaro further described as being sixteen years of age (T. at 167) and "lived up the street in the big house with the bricks on the front, next to the Patchet's house." (T. at 247).

Once at the police station, without the presence of his parents, a guardian or an attorney (T. at 824-825) the Defendant made oral admissions (T. at 814-820) and a tape-recorded confession. (T. at 824-847). Prior to trial and at the conclusion of all the evidence at trial the defense moved to suppress the admissions and confession and a tape-recorded interview made on March 6, 1975 with State's Attorney Arnold Markle (T. at 864-869). The defense contended that the defendant, a drug addict, who had drugs in his possession at the time of his arrest (T. at 1219), was so under the influence that his statements were made involuntarily. The motion to suppress was denied and the statements were heard by the jury. (T. at 847).

The Defendant testified in his own defense. (T. at 1175). Defendant's recollection of the events at Frank's Market were hazy, but he did recall Mrs. Massaro began to scream and then a gun went off. (T. at 1211). He next recalled that someone was running toward him, and this is all he could recollect about the incident. (T. at 1211). The Defendant then testified that he arrived at Mr. Mansi's home looking for his son. (T. at 1212). When he left he waved down a car being driven by Fred Melillo who took him to his uncle's home. (T. at 1213-1214). The next thing the Defendant recalled was

being picked up by Domenic DeLucia. (T. at 1214), and being taken to his home when the police arrived. (T. at 1214). The Defendant had no recollection of being driven to Frank's Market by Robert McKiernan, (T. at 1215) or of confessing to the crime. (T. at 1215).

The Defendant further testified that he started using drugs in the ninth grade. (T. at 1176-1177). Initially, he ingested soft drugs (T. at 1177) and then graduated to seconals, mandrakes, quaaludes and nembutal. (T. at 1179). At age fifteen he attended a drug counselling program and attended Alpha House for a day or two, but then he left the program. (T. at 1183). During his second year or high school the defendant used L.S.D., cocaine, morphine and dilaudid (T. at 1184). He ingested drugs every day. (T. at 1184).

The Defendant further testified that on the date of the murder, March 5, 1975, he was under the influence of drugs and had no clear recollection of the events of that day. (T. at 1189). He did recall being at the home of Domenic DeLucia early in the day, but could not recall any details. (T. at 1189-90). Later in the day he went to Lenny's Garage and saw some people in the office. (T. at 1193-94). The Defendant also recalled knocking on the door of a home on Laurel Street and an elderly woman answering. (T. at 1194). The next thing the Defendant recalled was being inside of Frank's Market. (T. at 1195-97).

The Defendant also testfied that on March 4, 1975, he ingested a drug known as quaaludes which is a depressant. (T. at 12-20). He had about 100 of them. (T. at 1220).

During cross-examination the Defendant admitted to burglarizing DeLucia's home on March 5th and stealing a number of items. (T. at 1232-34, 1264). He further testified that he had no recollection of where he got the gun and ammunition he used in the shootings. (T. at 1242-43). Nor did he recollect using a gun or shooting the victims (T. at 1243-1248), but neither did he deny the commission of the crimes. (T. at 1250, 1270-71).

To corroborate the claim that Defendant lacked the requisite criminal intent because of drug intoxication, the defense called a number of witnesses. The Defendant's parents testified to their son's drug history. (T. at 1053-1060, 1144-1149), the fact that he was under the influence of drugs during the evening of March 4, 1975 (T. at 1072-73, 1154) and the afternoon hours of March 5, 1975. (T. at 1075-1077). In addition, Mr. and Mrs. Turcio testified that they saw their son at the police station after his arrest and he was intoxicated. (T. at 1079, 1305) and that he was in the same condition on March 6, 1975 (T. at 1130, 1157).

The defense also called Attorney Fred D. Dahlmeyer who testified that he arrived at the East Haven police station on the night of March 5, 1975, in response to a request from the Defendant's father. (T. at 1424). Attorney Dahlmeyer met with the Defendant and observed that his eyes were nearly closed, that his speech was slurred, that he was physically "slow" and was unresponsive to a number of questions put to him. (T. at 1426-27). The Defendant's movements were "lethargic, slow" and he was "wobbly". (T. at 1429). Attorney Dahlmeyer had difficulty in understanding the Defendant. (T. at 1429). Attorney Dahlmeyer further

testified that he did not believe the Defendant to be under the influence of drugs on March 6, 1975. (T. at 1471).

The defense called a number of other witnesses who saw the Defendant on March 5, 1975. Victor Papolizo, Jr., an employee at Lenny and Sons Towing in East Haven, saw the Defendant at that garage during the early afternoon of March 5, 1975, and in his opinion the Defendant "was either drunk or under the influence of something." (T. at 1332-1334).

Another employee of Lenny and Sons Towing, Allen Warner, saw the Defendant during the late morning and early afternoon hours of March 5, 1975. (T. at 1400). He appeared to Warner to be "messed up," he was slouched in a chair, very talkative and mumbling. (T. at 1402-3).

John Orifice, whose son owned Lenny and Sons Towing, was at the establishment on March 5, 1975. (T. at 1473). He saw the Defendant between 2 and 3 p.m. and he appeared abnormal. (T. at 1475-76).

Mrs. Thomasina DeLucia testified that she saw the Defendant between 9:00 and 9:30 P.M. at her home on March 6, 1975. (T. at 1416-17). He appeared to be on drugs. His eyes "were awful funny and he was very, very calm..." (T. at 1418).

Debra Ann Dahlmeyer, the attorney's daughter, testified that she saw the Defendant on March 5, 1975, at 3 p.m. (T. at 1484-85), and his eyes appeared glassy. (T. at 1486).

The defense also called two of the Defendant's friends, David Leary and Robert Torres. Leary detailed the Defendant's drug

history. (T. at 1348-50). Leary last saw the Defendant a week or two before his arrest, but could not recall the exact date. (T. at 1350, 1352, 1355, 1359). On that occasion both Leary and the Defendant used drugs including quaaludes. (T. at 1352). Both youths were "messed up." (T. at 1353).

Robert Torres, 16 years of age, testified that he was currently residing at Alpha House, a drug rehabilitation center. (T. at 1369). Torres related that he and the Defendant experimented with drugs together. (T. at 1370-71). Torres last saw the Defendant about one to two days before his arrest on March 5, 1975 (T. at 1377), but he could not recall the exact date. (T. at 1377-78). When the Defendant knocked on his window at midnight and woke Torres out of bed (T. at 1372) the Defendant appeared intoxicated and asked Torres for a set of works. (T. at 1373). The Defendant remained with Torres for about 45 minutes to an hour and then left. Torres did not leave with the Defendant, but went back to sleep. (T. at 1378-79).

After a trial before a jury of twelve, the Defendant was convicted of the murder of Frank Massaro and the assault of Jean Massaro. He was sentenced to an effective term of not less than seventeen and one-half (17-1/2) years nor more than life imprisonment. The Connecticut Supreme Court affirmed the conviction on June 26, 1979.

REASONS FOR GRANTING THE WRIT

The decision rendered by the Connecticut Supreme Court concerning both of the issues raised herein are in conflict with the decisions of the highest appellate courts of other states and involve federal questions of

substance not herebefore determined by this Court.

I.

THE COURT'S CHARGE THAT THE JURY SHOULD WEIGH THE TESTIMONY OF CERTAIN DEFENSE WITNESSES WITH PARTICULAR CARE WAS ERRONEOUS AND AT VARIANCE WITH THE DECISIONS OF STATE COURTS IN WASHINGTON, MINNESOTA AND NORTH CAROLINA. AS A RESULT OF THIS ERRONEOUS INSTRUCTION, THE BURDEN OF PROOF WAS SHIFTED TO THE DEFENDANT, HE WAS THEREBY DENIED DUE PROCESS, A FAIR TRIAL AND THE EFFECTIVE ASSISTANCE OF COUNSEL.

In the course of his defense, the Defendant called a number of witnesses in support of his claim that he was under the influence of drugs when he committed the crimes in question. Among those witnesses were Defendant's parents, Mr. and Mrs. Joseph Turcio (T. at 1049, 1142, 1289), a relative, Michael Liso (T. at 1325), Defendant's friends and associates, David Leary (T. at 1347) and Robert Torres (T. at 1369) and Defendant's former lawyer, Attorney Fred. D. Dahlmeyer. (T. at 1423).

At the State's request, the Court charged the jury as follows:

> In weighing the credibility of a witness who is a member of defendant's family, or a friend, or an associate, or who bears a professional relationship to the defendant, you should scrutinize his or her testimony with particular care. (T. at 1670). [Emphasis supplied].

Defense counsel took exception to this portion of the charge as follows:

> Your Honor instructed the jury as to the interest of friends and relatives of the defendant, and instructed the jury that they can take into consideration, but failed to refer to similar consideration as to the State's witnesses who may have been acquainted with or friendly with the victims in this case, including not only lay witnesses, but police officers. (T. at 1746-1747).

On appeal to the Connecticut Supreme Court Petitioner assigned the charge as error on three grounds: (1) it was unbalanced, (2) it shifted to the Petitioner the burden of proof and (3) denied Petitioner due process of law and a fair trial. The Connecticut Supreme Court rejected the claim and held that the charge was fair comment on the credibility of witnesses and well balanced, and when read with other portions of the charge did not shift the burden of proof. In so doing the Connecticut Supreme Court ignored decisions cited to it from the States of Washington, Minnesota and North Carolina that have condemned such a charge.

A trial court has a duty to instruct the jury on the issue of credibility. Likewise, it is perfectly proper for the trial court to advise the jury that it may consider any bias or interest a witness may have. However, such a charge must be even-handed. It should not unduly emphasize either side, and should in no way suggest that one class of witnesses is less believable because of bias or prejudice.

> [I]t has been held improper to direct the jury to consider the interest of a particular witness or class of witnesses in

> weighing his or their testimony without directing attemtion to the interest on the other side. 75 Am.Jur.2d, TRIAL §861 (1974) 23A C.J.S., Criminal Law, §1308 (1961)

A number of jurisdictions have addressed the problem that a charge such as the one given in the instant case creates. In State v. Huff, 76 Wash. 2d 577, 458 P.2d 180 (1969) the court noted the underlying danger created when a trial court singles out the testimony of a particular class of witnesses:

> To single out the testimony of a particular witness for discussion in an instruction (unless it be a particular class, such as an accomplice) seems to us to be argumentative, to be an invasion of the province of the jury, and to suggest the court's belief that the testimony of the witness is suspect...Id. at 458 P.2d 182; also see State v. Bibee, 496 S.W. 2d 305, 314 (1973); State v. Everett, 488 S.W. 2d 873, 878 (1970)

In State v. Bishop, 289 Minn. 188, 183 N.W. 2d 536 (1971) the defense asked the trial court to instruct the jury that certain indentification testimony be "scrutinized with extreme care." [Emphasis supplied.] Affirming the trial court's refusal to give the charge the Supreme Court of Minnesota said:

> It is generally held that it is improper for the court to single out particular witnesses and charge as to their credibility. [citing 19 Dunnell, Dig. (3 ed.) §§9786, 9787; 53 Am. Jur., TRIAL § 615]; Id. 183 N.W. 2d at 540.

Other jury charges using wording similar to the "with particular care" language in the instant have constituted reversible error. In State v. Davis, 223 N.C. 57, 25 S.E.2d 187 (1943) the following charge led to a new trial:

> The law regards with suspicion the testimony of near relations, other interested parties and those testifying in their own behalf.... The evidence of near relations, interested parties and those testifying in their own behalf must be taken with some degree of allowance. Id. 25 S.E. 2d at 188.

The appellate court in State v. Lamb, 30 N.C. App. 255, 226 S.E. 2d 680 (1976), held that a jury charge indicating that the testimony of defendant's uncle "should be carefully scrutinized," required a new trial.

The North Carolina Supreme Court has sanctioned a charge that the testimony of a defendant's relatives should be scrutinized, but only if the court also instructs the jury that if after such scrutiny the testimony is believed it must be given the same weight and credence as that of other witnesses. State v. Eakins, 292 N.C. 445, 233 N.E. 2d 387, 388 (1977).

While Petitioner believes the latter North Carolina rule to be inadequate, the charge in question herein falls far short of even that standard for three very significant reasons. First the jury in the instant case was not advised that if after weighing the testimony of defendant's witnesses "with particular care" it believed that testimony, it should give the testimony the same weight and credence as that of other witnesses. Secondly the charge in the

instant case not only focused on defendant's relatives, but also included his friends (Torres and Leary) and his former attorney (Dahlmeyer). Thirdly, the charge in the instant case not only called undue attention to defense witnesses, but went even further and advised the jury that it should weigh their testimony "with particular care." This type of charge is normally reserved for witnesses who are perjurers, accomplices and informers. A comparison of the charge given in this case with the perjurer, accomplice and informer charges from Devitt & Blackmar, Federal Jury Instructions (1979) follows:

The Turcio Charge

> In weighing the credibility of a witness who is a member of the Defendant's family, or a friend, or an associate, or who bears a professional relationship to the Defendant, you should scrutinize his or her testimony with particular care. (T. at 1670). [Emphasis supplied]

The Informer Charge

> The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant. [Emphasis supplied.] Id. at §17.02.

The Perjurer Charge

The testimony of an admitted perjurer should always be considered with caution and weighed with great care. [Emphasis supplied.] Id. at §17.05.

The Accomplice Charge

An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received in evidence, and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care...[Emphasis supplied.] Id. at §17.06.

Instead of using the language "greater care" or "great care," the court in the instant case used the phrase "with particular care." The effect, however, was the same as when the informer, perjurer or accomplice charge is given, to wit: to call special attention to the witness or witnesses and to have the jury scruntinize their testimony with greater care than the testimony of other witnesses.

The charge in the instant case was erroneous in and of itself. When read, however, with other portions of the court's instructions which specifically commented on the same defense witnesses referred to in the "particular care" charge, the jury was left with the clear impression that Defendant's parents, his friends, Torres and Leary, and his former attorney should be disbeleived. For example, immediately before the "particular care" language, the court charged:

> The State has the right to show any bias or interest toward the defendant on the part of witnesses for the defense. The evidence elicited from these witnesses, by cross-examination, concerning the nature of their relationship with the defendant, indicated long-term friendships with such witnesses as Mr. Torres and Mr. Leary, and their obvious common interest and values. This is relevant evidence which had a direct bearing on the credibility of these witnesses. (T. at 1669-1670).

The court also instructed the jury on the significance of felony convictions in weighing credibility, and once again referred to the defense witnesses:

> In this matter of credibility, for example, you may consider the testimony of Mr. Turcio, Senior, in which he conceded, during cross-examination, to having given prior erroneous, inconsistent testimony, at a pretrial hearing. I instruct you that it is all proper for you, as jurors, to determine credibility upon these terms.

> You will recall again, in determining fact from evidence offered to you in court, that it was disclosed that the witnesses, Mr. Turcio, Senior, and Mr. David Leary, had been convicted of a serious crime. A witness is not disqualified because of his conviction of crime; but, such conviction may be shown for the purpose of affecting his credibility. (T. at 1673).

Thus in five consecutive pages of its charge the court advised the jury to weigh the testimony of key defense witnesses "with particular care" and then went on to cite specific matters for them to consider. Mr. and Mrs. Turcio, Torres and Leary, and Attorney Dahlymeyer were central to the intoxication issue, the sole defense. In effect, the court's charge undermined their credibility, shifted the burden of proof and denied Defendant a fair trial, all in violation of due process.

In addition to the foregoing the instant charge further prejudiced the Petitioner in that it advised the jury that the testimony of Attorney Fred Dahlmeyer should be weighed with "particular care." An accused, of course, has the constitutional right to counsel after arrest. After Defendant was arrested and confessed, Attorney Dahlmeyer arrived at the police station and at trial testified to his observations of the Petitioner during this period. To suggest in a charge that the attorney's testimony should be weighed in the same manner as the testimony of an accomplice, informer or perjurer erodes the right to counsel guaranteed by the Sixth Amendment.

II.

THE COURT'S REFUSAL TO SUPPRESS THE CONFESSION AND ADMISSIONS OF THE SIXTEEN (16) YEAR OLD DEFENDANT FOR THE REASON THAT HE WAS ASKED TO WAIVE HIS MIRANDA RIGHTS WITHOUT THE PRESENCE OF HIS PARENTS, AN ATTORNEY, A GUARDIAN OR OTHER INTERESTED ADULT WAS ERRONEOUS. IN SO HOLDING THE COURT ADOPTED A "TOTALITY OF THE CIRCUMSTANCES" TEST AND REJECTED DECISIONS BY COURTS IN PENNSYLVANIA, INDIANA, GEORGIA AND LOUISIANA THAT HAVE ADOPTED A PER SE EXCLUSIONARY RULE FOR DEFENDANTS UNDER THE AGE OF EIGHTEEN (18).

Before trial, defense counsel moved to suppress certain statements made by Defendant including a tape-recorded statement of March 5, 1975, any statements made by Defendant after his apprehension by police up to the point when the tape recording began, any sketches or drawings made in the presence of law enforcement officials, any waivers of rights made orally or in writing by Defendant on March 5 and 6, 1975 and any oral statements made by Defendant on March 6, 1975 in the presence of Sg.t Joseph Izzo. As grounds for the motion, counsel alleged that the statements were taken in violation of Defendant's constitutional rights against self-incrimination, to effective assistance of counsel and due process of law, and were not voluntarily and knowingly made. Furthermore, the motion alleged that the Defendant did not knowingly waive his rights.

An extensive hearing was held before trial, and in a memorandum of decision the motion to suppress was denied. At the conclusion of all the evidence at trial the motion was renewed and again denied. (T. at 1652-1653).

On appeal Petitioner asked the Connecticut Supreme Court to adopt a rule recognized by courts in Pennsylvania, Indiana, Georgia and Louisiana. In order to sustain a purported waiver of Miranda rights by a sixteen (16) year old Defendant in the foregoing four jurisdictions the state must show that the Defendant actually consulted with an attorney or other adult before the waiver and that the attorney or adult consulted was interested in the welfare of the Defendant and if an adult other than an attorney was consulted the adult was fully advised of Defendant's rights.

In rejecting the claim, the Connecticut Supreme Court refused to adopt this rule and instead adhered to a "totality of the circumstances" test, and concluded that the trial court's finding that Petitioner knowingly and intelligently waived his Miranda rights was fully supported by the record. Although the issue raised herein was not specifically raised at trial, the Connecticut Supreme Court reviewed the claim because of its constitutional dimensions. State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973).

FACTUAL BACKGROUND

In its memorandum of decision the trial court found certain facts that we concede were adequately supported by the record and within the discretion of the trial court to find. No purpose can be served by repeating the facts found. Since the issue raised herein was not raised at trial, a review of the facts relevant to the instant claim is hereinafter set forth.

On the evening of March 5, 1975 police officer Oren was called to the DeLucia home where Defendant was being held by the

DeLucia family for a burglary. Officer Oren arrived and read the Defendant his Miranda rights and brought him to the police station. Shortly after 10:00 P.M. at the police station the Defendant was again advised of his Miranda rights and executed a waiver at 10:15 P.M. At about 10:45 P.M. police officer Izzo arrested the Defendant for the Frank's Market incident and again read him his Miranda rights and Defendant executed another waiver. Thereafter Defendant was taken to the detective room for questioning. After approximately five minutes Defendant made an oral inculpatory statement, together with markings on a sketch and thereafter a recorded statement.

The taping was interrupted and curtailed by the arrival of the family lawyer, Fred Dahlmeyer, who had been called by Defendant's father. Mr. Turcio was called at the suppression hearing and testified as follows. (Motion to Suppress Transcript, hereinafter "M.S.T.", at 233-280). He received a phone call around 10:30 P.M. from his brother-in-law telling him that his son was down at the police station. (M.S.T. at 233). This was his first knowledge of the arrest. (M.S.T. at 233). Mr. Turcio then called Attorney Dahlmeyer and went down to the police station. (M.S.T. at 234-235). When he arrived at the police station, Attorney Dahlmeyer was already there. The attorney conferred with the Defendant and Mr. Turcio remained in another room. (M.S.T. at 235). Mr. Turcio then went home, conferred with Mrs. Turcio and returned with some clothes. (M.S.T. at 235-236). Thereafter Mr. Turcio saw his son for a few seconds, but did not say anything to him. (M.S.T. at 236-239). Mr. Turcio was advised that he couldn't see his son until the morning and the couple returned in the early morning. (T. at 239-240; 261-265; 276-277). This was the

first time Mr. Turcio talked to his son and the conversation lasted about five minutes. (T. at 266).

In his memorandum, the trial judge noted that before the Defendant made the oral and tape-recorded admissions, "the record grounds no finding as to whether the Defendant ever asked to have his parents present".

THE LEGAL AUTHORITIES

The Defendant was sixteen years old on the date of the offense. Under Connecticut law, a sixteen year old defendant is a minor and a youthful offender. He is accorded special status because of his age and immaturity. At least four states have recognized that a defendant under the age of eighteen is entitled to consult with his parents or another adult when asked to waive his Miranda rights. The record is clear that this did not occur in the instant case.

Commonwealth v. Smith, 472 Pa. 492, 372 A.2d 797 (1977) litigated the issue of effective waiver of a minor's constitutional rights prior to custodial interrogation. In Smith, the defendant, a 17 year old youth, was charged and convicted of murder. During custodial interrogation following his arrest the defendant made an inculpatory statement which was used against him at trial. In reversing the conviction and ordering a new trial, the court recognized that "due process requires that a waiver by a youthful offender is effectuated only when it has been shown that the minor comprehended the full significance of the panoply of rights that protects him during custodial interrogation." Id. at 372 A.2d 799. To insure such comprehension, the court formulated the following rule:

> [T]he impediment of immaturity can only be overcome where the record establishes that the youth had access to the advice of an attorney, parent, or other interested adult and that the consulted adult was informed as to the constitutional rights available to the minor and aware of the consequences that might follow the election to be made. Id. 372 A.2d at 800.

In Smith, unlike our case, the defendant's father heard the Miranda warnings and was invited to accompany his son to the police station. Even this, in the view of the court, was not adequate to insure a knowing and intelligent waiver. Under Smith, failure by the state to establish:

> [E]ither the adult was one interested in the welfare of the juvenile accused, that the adult was aware of the rights of the accused, or that the minor had an opportunity to consult, would justify the conclusion that the purported waiver was ineffective. Id. 372 A.2d at 803.

The Smith decision, supra is the most recent Pennsylvania case to recognize the importance of parental or adult guidance in waiving a minor's Miranda rights. Commonwealth v. Roane, 459 Pa. 389, 329 A.2d 286 (1974) (16 year old defendant); Commonwealth v. Starkes, 461 Pa. 178, 335 A.2d 698 (1975) (14 year old defendant); Commonwealth v. McCutchen, 463 Pa. 90, 343 A.2d 669 (1975) (15 year old defendant) U.S.

cert. denied in 424 U.S. 934; Commonwealth v. Harvell, 477 Pa. 126, 374 A.2d 1282 (1977) (17 year old defendant).

The Supreme Court of Indiana in Lewis v. State, 259 Ind. 431, 288 N.E. 2d 138 (1972) adopted an exclusionary rule similar to the one recognized in Pennsylvania. In Lewis the defendant was 17 years of age and convicted of murder. He was brought to the police station as a suspect, advised of his Miranda rights and executed a written waiver. Thereafter the defendant confessed, and after the confession called his mother.

The court first noted that persons under eighteen years of age occupy a special legal status in our society. In many states, they are unable to execute a binding contract, convey real property, unable to marry without parental consent, purchase alcoholic beverages or donate their own blood. It would be inconsistent and unjust, noted the court, to require such persons to stand on the same footing as an adult when asked to waive important Fifth and Sixth Amendment rights. Id. 288 N.E.2d at 141-142.

The court reversed the conviction and said:

> We hold therefore that a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent. Furthermore, the child must be given an opportunity to consult with his

> parents, guardian or an attorney representing the juvenile as to whether or not he wishes to waive those rights. After such consultation the child may waive his rights if he so chooses provided of course that there are no elements of coercion, force or inducement present. This approach has been advocated by several commissions who have studied this area and we believe it represents the best solution to a difficult and re-occuring problem. Model Rules for Juvenile Courts, Rule 25, Evidence (1969), proposed by the Council of Judges of the National Council on Crime and Delinquency, Proposed Indiana Rules of Juvenile Procedure, Rule 9. Having a familiar and friendly influence present at the time the juvenile is required to waive or assert his fundamental rights assures at least some equalization of the pressures borne by a juvenile and an adult in the same situation.

Likewise, the Supreme Courts of Georgia and Louisiana have adopted the same per se rule adopted in Pennsylvania and Indiana and have rejected reliance on the "totality of circumstances" test accepted by the Connecticut Supreme Court in the instant case. Freeman v. Wilcox, 167 S.E.2d 163 (Ga. Ct. App. 1969); In re Dino, ___La.___, 359 So. 2d 586 (1978).

Under Connecticut law a sixteen year old is not a juvenile. The test, however, of what rights a minor under the age of eighteen is to be afforded should not depend on his classification under state law as a "juvenile".

Should a seventeen-year-old "juvenile" in Pennsylvania, Indiana, Georgia and Louisiana be entitled to greater constitutional protections than a sixteen-year-old "adult" in Connecticut? If anything the sixteen-year-old accused in Connecticut should be afforded greater protection since the consequences of prosecution he faces as an "adult" are much more serious than the consequences facing the seventeen-year-old Pennsylvania "juvenile".

Connecticut law does not permit a sixteen-year-old minor to appear in court without one of his parents or a guardian ad litem. Fahay v. State, 25 Conn. 204, 106 (1856). The parent or guardian is there to advise the defendant of many things including whether to waive his privilege against self-incrimination by testifying in his own defense or by pleading guilty. To require adult advice in court but not while the minor is in custody makes no sense. If the minor needs adult advice in the courthouse where his lawyer is present, it is even more important that he have the same protection at the police station when no counsel is present.

As we have noted, the trial court's memorandum notes that "the record grounds no finding as to whether the Defendant ever asked to have his parents present". Under the standards adopted by Pennsylvania, Indiana, Georgia and Louisiana, the prosecution has the burden of establishing a knowing, intelligent and voluntary waiver of Miranda rights. Here the State failed to establish that Defendant waived his parents' presence. At a minimum this Court should adopt a rule requiring the State to prove by a preponderance of the evidence that a sixteen-year-old defendant was advised

of his right to have his parents present and waived same. Such a rule would not satisfy the Pennsylvania, Indiana, Georgia and Louisiana tests, but would supply some minimum protection for the youthful offender.

The trial judge also found that the Defendant had drugs on his person when arrested on March 5, 1975. At trial, but not at the suppression hearing, defense counsel called scores of witnesses to testify to Defendant's drug addiction history and his intoxicated condition on March 5, 1975. Their testimony is persuasive that there was not a knowing, intelligent and voluntary waiver of fundamental constitutional rights in this case.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,
THE PETITIONER

By HUBERT J. SANTOS
A Member of the Bar
of the Supreme Court
of the United States

Dated: August 27, 1979

APPENDIX

APPENDIX (1)

Opinion of Connecticut State Supreme Court,
XL Conn. L. J. No. 52 at 4
(June 26, 1979)

SUPREME COURT

January Term, 1979

STATE OF CONNECTICUT *v.* JOSEPH TURCIO

COTTER, C. J., LOISELLE, BOGDANSKI, PETERS and PARSKEY, Js.

Argued January 9—decision released June 26, 1979

Indictment charging the defendant with the crime of murder and information charging the defendant with the crimes of assault in the first degree and robbery in the first degree, brought to the Superior Court in New Haven County and tried to the jury before *McCarthy, J.;* verdicts and judgments of guilty and appeals by the defendant. *No error.*

Hubert J. Santos, with whom, on the brief, was *A. Susan Peck,* for the appellant (defendant).

Ernest J. Diette, Jr., assistant state's attorney, with whom, on the brief, were *Arnold Markle,* state's attorney, and *John T. Redway,* assistant state's attorney, for the appellee (state).

LOISELLE, J. The defendant was found guilty by a jury of twelve of causing the death of Frank Massaro, while committing or attempting to commit a robbery, in violation of General Statutes § 53a-54c and also guilty of the crime of assault in the first degree upon Jean Massaro, in violation of General Statutes § 53a-59 (a) (1) and of robbery in the first degree in violation of General Statutes § 53a-134 (a) (1). From the judgments rendered on the verdicts, the defendant has appealed.

On March 5, 1975, at about 8 p.m., the owners of Frank's Market on Foxon Road in East Haven, Frank and Jean Massaro, were closing their store.

Mrs. Massaro went to their car first, carrying a cigar box containing money. After she and her husband got into their car, the defendant jumped in behind them waving a gun. Mrs. Massaro turned, saw the defendant's face, opened the car door, got out and ran screaming around the car. She was then shot in the back and fell to the ground. She heard another shot and saw her husband fall. The defendant then picked up the cigar box and ran. Frank Massaro died as a result of the shooting.

Both in his brief and at oral argument, the defendant conceded that the state had a "strong" case against him and that the real issue was whether he was so intoxicated from the use of drugs as to be incapable of forming the requisite intent required to be convicted of the crimes charged. To resolve this issue, both the state and the defendant introduced evidence as to the defendant's activities on the day of the shootings and of his condition prior thereto, including the early morning hours of March 3, 1975, the details of which are discussed more fully in response to the defendant's claims of error in the charge and in certain evidentiary rulings.

The defendant has raised and briefed numerous claims of error. In this case, the maximum sentence was life imprisonment. It has been the policy of this court that in such situations, although the research and decision process are not affected, the opinion is more detailed than is otherwise warranted.

I

The defendant first contends that the court erred in charging the jury that it should weigh the testimony of a certain class of witnesses "with particular care." In presenting his defense, the defendant called a number of witnesses to testify in support of his claim that he was under the influence of drugs when he committed the crimes in question. Among

those witnesses were the defendant's parents, Joseph Turcio, Sr., and Jeanette Turcio, his uncle Michael Liso, his friends David Leary and Robert Torres, and his former attorney, Fred D. Dahlmeyer. At the prosecution's request the trial court charged the jury as follows: "In weighing the credibility of a witness who is a member of defendant's family, or a friend, or an associate, or who bears a professional relationship to the defendant, you should scrutinize his or her testimony with particular care." Defense counsel excepted to this charge on the ground that there was a lack of balance.[1]

The issue as presented on appeal is whether it is permissible for the court to single out a particular class of witnesses and instruct the jury to scrutinize their testimony more carefully because they have a particular relationship with the defendant. In determining the credibility of a witness, the jury may take into account the fact that he stands in some legal or contractual relationship to a party which might affect his testimony, such as where the witness is an attorney, a relative, or a friend. As a general rule, "[a] court may not by an instruction deny to the jury the right to consider the interest of a party in determining the credit to which his testimony is entitled, but in instructing the jury as to the credibility of witnesses, may authorize them to take into consideration the interest of the witnesses, if any, in the result of the lawsuit, and in a proper case should caution the jury as to the care to be exercised in weighing the testimony of interested persons." 75 Am. Jur. 2d, Trials, § 861, p. 743.

[1] The state contends that the grounds raised on appeal are different than those asserted at trial. From reading the record and the defendant's brief, it is apparent that the substance of the objection on appeal is basically the same as that made at the trial court and that the defendant clearly apprised that court of his objection. Therefore, the defendant's claim is addressed as presented here. *State* v. *Rado,* 172 Conn. 74, 81, 372 A.2d 159 (1976).

In an analogous situation, that of instructions concerning the alibi witness, this court has held that an instruction as to the interest of witnesses is correct and necessary: "On numerous occasions this court has stated that the trial court in a criminal case may, in its discretion, make fair comment on the evidence and particularly on the credibility of witnesses. See *State* v. *Tropiano,* 158 Conn. 412, 428, 262 A.2d 147; *State* v. *LaFountain,* 140 Conn. 613, 620, 103 A.2d 138; *State* v. *Pecciulis,* 84 Conn. 152, 158, 79 A. 75. In addition, we have also declared that an instruction on the credibility of alibi witnesses similar to that challenged by this assignment of error is both proper and fair when weighed in the light of the other paragraphs of the charge. *State* v. *Groos,* 110 Conn. 403, 410, 148 A. 350; *State* v. *Cianflone,* 98 Conn. 454, 466, 120 A. 347 . . . . It is well recognized that the credibility of alibi witnesses is a subject as to which fair comment by the court to the jury is allowed. See *Sullivan* v. *Scafati,* 428 F.2d 1023 (1st Cir.), cert. denied, 400 U.S. 1001, 91 S. Ct. 478, 27 L. Ed. 2d 452; *Surridge* v. *State,* 239 Ark. 581, 393 S.W.2d 246; *Commonwealth* v. *Sullivan,* 354 Mass. 598, 239 N.E.2d 5, cert. denied, 393 U.S. 1056, 89 S. Ct. 697, 21 L. Ed. 2d 698; *State* v. *Griffin,* 336 S.W.2d 364 (Mo.); *Commonwealth* v. *Gates,* 392 Pa. 557, 141 A.2d 219; *Rogers* v. *State,* 455 S.W.2d 182 (Tenn. Crim. App.); *Bolin* v. *State,* 219 Tenn. 4, 405 S.W.2d 768." *State* v. *Cari,* 163 Conn. 174, 182, 303 A.2d 7 (1972). While the defendant here did not offer an alibi in the sense that he claimed to be somewhere else at the time of the shooting, the testimony offered by the witnesses in question went directly to his only defense, i.e., intoxication due to drug ingestion, and is, therefore, quite similar to the alibi defense in *Cari,* supra. See also *State* v. *Bennett,* 172 Conn. 324, 329–30, 374 A.2d 247 (1977); *State* v. *Jones,* 167 Conn. 228, 238, 355 A.2d 95 (1974).

The defendant further contends that the trial court's instructions[2] as to prior inconsistent statements and witnesses with prior felony convictions and ascertainable interests compounded the problem, because taken together with the "particular care" charge they suggested that certain defense witnesses should not be believed.[3] The court was correct in its instructions on the credibility to be accorded witnesses with prior felony convictions, ascertainable interests or who had given prior inconsistent statements. It was an unfortunate situation, but one for which the trial court had no responsibility to compensate, that only those witnesses who had testified for the defendant fell into these categories. The rule is well settled in this state that a charge does not rise or fall on individual, isolated sentences, but must be looked at as a whole. This court laid down the test in *State* v. *Ralls,* 167 Conn. 408, 422, 356 A.2d 147 (1974): "The charge to the jury, however, must be read as a whole, and an attempt to assert reversible error

[2] The court instructed as follows:

"The state has the right to show any bias or interest toward the defendant on the part of witnesses for the defense. The evidence elicited from these witnesses, by cross-examination, concerning the nature of their relationship with the defendant, indicated long-term friendships with such witnesses as Mr. Torres and Mr. Leary, and their obvious common interest and values. This is relevant evidence which had a direct bearing on the credibility of these witnesses."

Later the court also instructed:

"In this matter of credibility, for example, you may consider the testimony of Mr. Turcio, Sr., in which he conceded, during cross-examination, to having given prior erroneous, inconsistent testimony, at a pretrial hearing. I instruct you that it is all proper for you, as jurors, to determine credibility upon these terms.

"You will recall again, in determining fact from evidence offered to you in court, that it was disclosed that the witnesses, Mr. Turcio, Sr., and Mr. David Leary, had been convicted of a serious crime. A witness is not disqualified because of his conviction of crime; but such conviction may be shown for the purpose of affecting his credibility."

[3] In discussing what had a direct bearing on credibility, the court noted that Joseph Turcio, Sr., made prior inconsistent statements and had a felony conviction; that Robert Torres and David Leary were long-term friends of the defendant; and that Leary had a felony conviction.

by culling a single phrase or inaccurate statement must fail unless it is reasonably probable that the jury were misled. *State* v. *Tropiano,* 158 Conn. 412, 433, 262 A.2d 147, cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288; *Penna* v. *Esposito,* 154 Conn. 212, 215, 224 A.2d 536; *Allard* v. *Hartford,* 151 Conn. 284, 292, 197 A.2d 69." The charge in the instant case was well balanced. Prior to giving the complained of charge on "particular care," the court gave the following instruction on how to determine the credibility of all the witnesses: "In weighing the testimony of a witness, you should consider his appearance on the stand; you should try to size him up; you should have in mind all those little circumstances which point to his truthfulness or untruthfulness; you should consider any possible bias or prejudice he may have, whether for or against the state or the accused; his interest or lack of interest, of whatever sort, in the outcome of the trial . . . you should test the evidence he gives you by your own knowledge of human nature, and of the motives which influence and control human beings." Moreover, the charge contained the customary reference to the presumption of innocence and the burden on the state to prove all the elements of the offense beyond a reasonable doubt before they could convict. Taken as a totality, it is obvious that the charge accurately and adequately presented the law to the jury. *State* v. *Roy,* 173 Conn. 35, 40, 376 A.2d 391 (1977); *State* v. *Crawford,* 172 Conn. 65, 69, 372 A.2d 154 (1976); *State* v. *Mullings,* 166 Conn. 268, 275, 348 A.2d 645 (1974). In light of the fact that the jury had already been instructed that in weighing the credibility of all witnesses they could consider the ordinary factors that might affect recollection or produce bias, the additional instruction was inappropriate and should be discouraged. When viewed as a whole, however, the charge did nothing more than state to the jury

what good common sense dictates; namely, that they may weigh on the credibility scale the potential for bias where a witness has some relationship with a party to an action.

II

The defendant's second assignment of error is that the trial court erred in allowing the defendant's father to be cross-examined as to other crimes and bad acts committed by the defendant. On direct examination, the defendant's father was asked about and gave his opinion as to his son's propensity for violent conduct. On cross-examination, the prosecution questioned the father about his knowledge of specific incidents in which his son was involved. On this appeal, the defendant claims that this cross-examination should have been excluded for two reasons: (1) a portion of the examination violated this court's holding in *State* v. *Martin,* 170 Conn. 161, 365 A.2d 104 (1976), that a character witness cannot be cross-examined as to specific acts of misconduct in detail to disprove the trait in question; and (2) other portions of the objected-to examination were not relevant to rebut the claim of nonviolence.

The following is a synopsis of the testimony in issue. In support of the intoxication defense, the defendant's father took the stand and testified about his son's problems with drugs and his intoxicated condition on March 5, 1975. During his direct testimony, Joseph Turcio, Sr., was asked by defense counsel to render an opinion as to his son's propensity for violence. Before Turcio responded, the prosecutor objected on the grounds that the question was irrelevant. In the ensuing colloquy, the prosecution indicated that it felt that this question was placing the defendant's character into issue. In response, defense counsel claimed that the question went to establishing whether the defendant had as

a "trait" the tendency to commit violent acts. Turcio then testified that his son was a calm boy and that he had "never seen him act violently."

On cross-examination of Turcio, the prosecution delved into the issue of the defendant's character and tendency to nonviolence as follows: Turcio was asked if he knew that his son "pushed your wife around and was somewhat belligerent and physical with her on July 25th of 1974." Turcio's answer was that he was not aware of the incident. The prosecution then asked whether Turcio knew that his son struggled with the police when they responded to the incident and that the police had to subdue him. Turcio responded that he was not aware of the incident. The prosecution also asked Turcio whether he and his son had a fistfight in August of 1974. Turcio's response was that he remembered the incident, but he explained that no blows had been exchanged. The prosecution next asked Turcio whether he knew that his son had created a disturbance at the East Haven Middle School in March of 1973. Turcio answered that he did not know of the incident. Turcio was then asked whether he knew that his son in June of 1973 had thrown a firecracker out of a car at a police officer. Turcio's reply was that he was aware that his son had thrown a firecracker in front of the police station, but he was not aware it was at a police officer.

From the form and content of the questions excerpted above, it is obvious that the purpose of the cross-examination in the present case was not to prove that certain acts occurred, and thereby disprove a trait of character, but to test the witness' concept of the character trait, the extent of his observations, and the good faith with which he testified. It is also obvious from the phrasing "did you know" and "do you recall" that the prosecution wanted to test the basis of the witness' opinion, not

to disprove the existence of the trait by proof of specific facts. The questions themselves contained no more detail than was necessary to apprise the witness of the specific incidents to which the prosecution was referring and did not require the witness to go into prejudicial detail in his answers.

Whether the accused produces testimony of reputation or opinion to prove a trait, the prosecution may not use specific acts of misconduct to disprove the trait. See *Verdi* v. *Donahue,* 91 Conn. 448, 454, 99 A. 1041 (1917), for the rationale of this rule. "There is a distinction between the prosecution's use of specific acts in rebuttal to disprove the trait in question and the prosecution's use of specific acts in the cross-examination of a character witness. When a character witness has given his opinion as to a particular trait, the state may cross-examine that witness concerning specific acts, not to prove the truth of such facts, but to test the credibility of the character witness by ascertaining his good faith, his source and amount of information and his accuracy. See *Michelson* v. *United States,* [335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168]; *United States* v. *Curry,* 512 F.2d 1299, 1305 (4th Cir.), cert. denied, 423 U.S. 832, 96 S. Ct. 55, 46 L. Ed. 2d 50; *United States* v. *Beno,* 324 F.2d 582, 588 (2d Cir.), cert. denied, 379 U.S. 880, 85 S. Ct. 147, 13 L. Ed. 2d 86; and see cases cited in annotation, 47 A.L.R.2d 1258, 1274–77. The question should not be extended to the details of the acts. See *Magee* v. *State,* 198 Miss. 642, 650, 22 So. 2d 245; *State* v. *Carroll,* 188 S.W.2d 22, 24 (Mo.); *Schroeder* v. *State,* 142 Tex. Crim. 443, 447, 154 S.W.2d 480. When, on cross-examination, questions as to specific acts are asked for that purpose, they are not objectionable." *State* v. *Martin,* 170 Conn. 161, 164–65, 365 A.2d 104 (1976).

As noted above, the defendant also objects to the prosecution's inquiries about the East Haven school disturbance and the throwing of the firecracker on the ground that those specific incidents were irrelevant to the issue of the defendant's propensity for violence. Defense counsel made a timely objection for the same reasons, but the trial court overruled the objection.

"Evidence of an accused's trait of character must be relevant to an element of the crime charged. *State* v. *Blake,* 157 Conn. 99, 104, 249 A.2d 232; *State* v. *Campbell,* 93 Conn. 3, 10, 104 A. 653. Likewise, when the prosecutor attacks the basis of the witness' opinion by questioning him as to his knowledge of specific acts, such acts must be relevant to those traits. See *Aaron* v. *United States,* 397 F.2d 584, 585 (5th Cir.); *People* v. *Marsh,* 58 Cal. 2d 732, 745, 376 P.2d 300. The determination of relevance must be made according to reason and judicial experience. *Robinson* v. *Faulkner,* 163 Conn. 365, 371, 306 A.2d 857. . . . 'In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done.' *State* v. *Brown,* 169 Conn. 692, 702, 364 A.2d 186. '[T]he ultimate issue is whether the court could reasonably conclude as it did.' *DiPalma* v. *Wiesen,* 163 Conn. 293, 299, 303 A.2d 709." *State* v. *Martin,* supra, 165–66.

The defendant's father asserted on direct examination that the defendant was a "calm boy." We cannot say that the trial court abused its discretion by deeming relevant the incidents of the school disturbance and the throwing of the firecracker, which refute the claim of a calm disposition. As to the prejudicial effect of the testimony, the trial judge,

in the exercise of judicial discretion, must decide whether the probative value of the testimony outweighs the prejudice likely to result from its admission. *State* v. *Ralls,* 167 Conn. 408, 417, 356 A.2d 147 (1974); *State* v. *Moynahan,* 164 Conn. 560, 597, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219 (1973). The defendant put his character into evidence through his father's testimony as to his opinion of his son's propensity for violence. The trial court did not err in allowing the state to question the basis of Turcio's opinion by referring to specific acts of the accused. The inquiry was relevant to traits in issue and the prosecution went into no more detail than was necessary to delineate and describe the incidents.

III

The defendant's third assignment of error is that the court improperly admitted into evidence testimony pertaining to certain specific acts of prior misconduct and crimes allegedly committed by the defendant. The defendant specifically objects to five separate incidents: (1) the state's introduction of testimony in its case in chief that on the day of the murder, March 5, 1975, the defendant burglarized a home and was found in possession of the fruits of that burglary later that day; (2) the state's introduction during the course of its cross-examination of the defendant's mother of an appearance bond form which indicated that the defendant had been arrested for trespassing on March 3, 1975; (3) in rebuttal, the state's presentation of more evidence concerning the defendant's arrest for trespass and the introduction of testimony that in the course and apprehension of the defendant and a companion, Robert Torres, shotgun shells were found on both of them; (4) the state's presentation of evidence in rebuttal that a policeman observed and followed the

defendant on March 4, 1975, at 2:30 a.m.; and (5) the state's offer of evidence that on September 19, 1974, an East Haven police officer fingerprinted the defendant.

As a general proposition, evidence of guilt of other crimes, because of its prejudicial nature, is inadmissible to prove that a defendant is guilty of the crimes with which he is charged. *State* v. *Holliday,* 159 Conn. 169, 172, 268 A.2d 368 (1970); *State* v. *Harris,* 147 Conn. 589, 599, 164 A.2d 399 (1960). Such evidence is admissible for other purposes, however, such as when it is particularly probative in showing such things as intent, an element in the crime, identity, malice, motive or a system of criminal activity, to name some exceptions to the rule. *State* v. *Brown,* 169 Conn. 692, 701, 364 A.2d 186 (1975). The trial judge, however, must determine in the exercise of judicial discretion that its probative value outweighs its prejudical tendency. *State* v. *Moynahan,* supra, 597; *State* v. *Holliday,* supra, 173. Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. *State* v. *Hauck,* 172 Conn. 140, 144, 374 A.2d 150 (1976); *Thomas* v. *Thomas,* 159 Conn. 477, 480, 271 A.2d 62 (1970); 1 Wharton, Criminal Evidence (13th Ed.) § 241.

The testimony to which the defendant has assigned error concerning the burglary was given by three witnesses, Domenic DeLucia, James Arcangelo and Anthony DeLucia, called by the state in presenting its case in chief.[4] The sum and substance of their testimony was as follows: Domenic DeLucia took the stand and testified on direct that between 9 and 9:30 p.m. on March 5, 1975, the

[4] The burglary itself is relevant because the defendant was brought to the police station initially in connection with it. It was while being questioned about the burglary at the DeLucia residence that he admitted shooting the Massaros.

day of the assault on the Massaros, he was a passenger in a car being driven by his cousin, James Arcangelo. DeLucia saw the defendant hitchhiking on route 80 in East Haven and Arcangelo stopped the car and they talked with him. While they were talking, DeLucia noticed that the defendant had in his possession DeLucia's wristwatch and his sister's ring. DeLucia then told the defendant to get into the car and, when the defendant resisted, the two exchanged punches. The trio then drove directly to DeLucia's home and DeLucia called the police because he believed that the defendant had robbed his house earlier that day. According to DeLucia, the defendant denied breaking into his house. The defendant also told him that the items taken from DeLucia's house between 10 and 11 a.m. were at David Leary's house.

DeLucia further testified that the police arrived at the house five or ten minutes after they were called. The police placed the defendant in custody and left. DeLucia saw other items on the defendant that were taken in the burglary including a cross, silver coins and rings. DeLucia did not see a gun on the defendant when he picked him up. On the stand, DeLucia identified a wallet that was stolen from his house. He stated that he saw the wallet on March 5, 1975, when it was taken out of the defendant's pocket. DeLucia also testified that while the defendant was with him he looked tired, but there was nothing unusual about him, that he understood everything the defendant said and that the defendant was not staggering or acting abnormally.

Immediately after DeLucia testified, the trial court at the request of the defendant gave an instruction on DeLucia's testimony, cautioning the jury that his testimony could be considered only for the limited purpose of explaining the confrontation.

James Arcangelo testified generally to the same effect. He also testified that although the defendant appeared tired, he seemed to know where he was. He had no difficulty walking, spoke clearly and his appearance was not unusual. No cautionary instruction was requested or given.

Anthony DeLucia, Domenic's father, testified that he was home when the defendant and his son and Arcangelo arrived shortly after 9 p.m. He asked the defendant if he had broken into the house and the defendant said no. He further testified that the defendant told his son: "I wouldn't rip you off, Domenic. If you want your stuff, I can take you right now. It's at Dave's."

On direct examination, the prosecution did not ask Anthony DeLucia about the defendant's physical condition. No limiting instruction was requested or given.

Before these witnesses were called, defense counsel objected to their testifying on the ground that the prior crime evidence he expected to be elicited would be prejudicial and lacked probative value; that evidence of a burglary which occurred between 10 and 11 a.m. was irrelevant to establish the defendant's state of mind at 8 p.m. the same day; that there were no witnesses to the burglary; and that the only link between it and the defendant was the fact that he had some of the stolen items in his possession. The prosecution claimed the testimony was relevant and thus admissible on two grounds: first, to negate the claim that the defendant's confession was involuntary because of his intoxicated condition and, secondly, to negate the defendant's anticipated defense that he lacked the intent to commit the crime because of his intoxicated state.

In the instant case, the defense was lack of specific intent to commit the crimes charged by reason of intoxication due to drug ingestion. In order to prove intent, an essential element of the crimes charged, the prosecution had the burden of disproving intoxication. To this end, testimony as to the defendant's demeanor, his ability to understand, his physical appearance, and his speech patterns, offered by individuals who observed and interacted with him a little less than an hour after the shootings, would be highly probative and relevant on the issue of intent. The testimony as to prior crimes was necessary background to explain how and why the defendant was in the presence of those three witnesses shortly after the shootings and as a basis for the admissions to the police which were to follow. See *State* v. *Harris*, 147 Conn. 589, 599, 606, 164 A.2d 399 (1960).

While it was not an abuse of the trial court's discretion to allow the testimony as to the morning burglary, because of its relevancy to intent and the issue of drug intoxication or lack of the same and its significance in establishing a context, it is important to note also that the same evidence was elicited later without objection from the arresting officer in testifying as to the voluntariness of the defendant's subsequent admissions while in custody. Further, after the inital testimony by DeLucia, the court gave a limiting instruction which correctly instructed the jury on its proper use.

IV

The defendant next attacks the court's allowance into evidence of an appearance bond form signed by the defendant two days before the shootings. The appearance bond in question contained the defendant's signature and indicated that he had been arrested for criminal trespass on March 3, 1975.

The context of the complained of error is as follows: During its case in chief, the prosecution introduced two *Miranda* warning cards without objection and a fingerprint card, all of which were offered solely to show the voluntary nature of the statements made by the defendant in police custody. Defense counsel objected to the admission of the fingerprint card on the ground of lack of relevancy, but the objection was overruled.

To support its claim that the defendant was so intoxicated by drugs that he lacked the required intent to commit the crimes charged, the defense called the defendant's mother, Jeanette Turcio, who was familiar with the defendant's handwriting, and questioned her about her son's handwriting on various exhibits. During cross-examination of Mrs. Turcio, the prosecution offered the appearance bond in question. Defense counsel objected to the admission of the bond on the grounds that it was evidence of a prior arrest and it had no probative value that outweighed its prejudical effect.

The state argued that the appearance bond was relevant to the issue of the defendant's mental ability or state of mind at the time it was signed. The court ruled that the offer of other comparative signatures was the operative condition for its admission; that it was relevant evidence to the issue of the defendant's ability to form intent; and that its probative value outweighed the prejudical context. The court noted that there was no way to excise the prejudicial parts of the form. Defense counsel made no suggestion on how to disguise the nature of the document at that time, except for exclusion.

On appeal, the defendant contends that he was prejudiced because the appearance bond form and the testimony surrounding its admission tended to

prove the commission of other crimes than that charged and unconnected with the case being tried. The defendant argues that the appearance bond form is similar to a mug shot and fingerprint card and therefore its admissibility should be dependent on the same criteria as that enunciated in *United States* v. *Harrington,* 490 F.2d 487 (2d Cir. 1973). Since *Harrington* was decided, this court has considered the effect of mug shots in evidence in at least four cases and has consistently followed the rule regarding any evidence which indicates prior criminal activity. In determining admissibility the trial court must consider whether such evidence is relevant and, if so, whether its probative value outweighs its prejudicial effect. See *State* v. *Peary,* Conn. (40 Conn. L.J., No. 13, pp. 1, 3) (1978); *State* v. *Crowe,* 174 Conn. 129, 131, 384 A.2d 340 (1977); *State* v. *Robertson,* 172 Conn. 9, 372 A.2d 128 (1976); *State* v. *Woods,* 171 Conn. 610, 370 A.2d 1080 (1976).

The defense raised by the defendant was that he lacked specific intent to commit the crimes charged due to intoxication. Evidence was introduced by the defense that the defendant had been "high" daily for two weeks up to and including the day of the shootings. There also was testimony that the defendant had taken the same amount and type of drugs on March 3, 1975, the day he was arrested for criminal trespass, as he took on the day of the shootings, March 5, 1975. In an attempt to prove that the defendant was intoxicated with drugs on the evening of March 5, 1975, the defense introduced a photostatic copy of the defendant's bankbook and his social security card with his signature. Mrs. Turcio identified the signatures on these items as the defendant's. She was then presented with two *Miranda* cards, which had previously been introduced by the prosecution for another purpose,

signed by the defendant the night of the killings, and was asked to identify the signatures. She testified that the signatures on the *Miranda* cards did not look like her son's writing. In response to this testimony, the prosecution introduced the appearance bond which had been signed two days before the shootings and asked Mrs. Turcio to identify the signature. Other samples of the defendant's handwriting were in evidence. Some were offered by the defense; others by the prosecution. The appearance bond, however, was the only other sample offered that was made by the defendant when he was supposedly "high." Thus, it was the only evidence available to contradict or at least to question the defendant's claim that his signature on the two *Miranda* warning cards indicated his intoxicated state.

It cannot be argued that the signature which was written only two days earlier was not relevant in view of the testimony of the defendant's mother concerning the appearance of his signature on the items signed shortly after the shootings, when the defendant was supposedly "high."

The argument that the evidence that the defendant was arrested for trespassing and was roaming the streets late at night shortly before the shootings could influence the jury in the determination of whether he committed the crimes charged loses its force since it is admitted that the state had a "strong" case against the defendant concerning the shootings. The real issue was whether he was intoxicated by drugs at the time as claimed by the defendant himself. In this context, it cannot be found as a matter of law that the court was in error in its finding that the probative value of this evidence outweighed its prejudical effect. It is also noted that the court gave a cautionary instruction to the jury which in no way focused the jury's attention on the source or nature of the document.

V

The defendant has further assigned as error the trial court's refusal to exclude Officer George Silk's testimony relating to a prior arrest and misconduct and the defendant's possession of a shotgun shell. In its rebuttal case, the state called Officer Silk, who testified that he had arrested the defendant and Robert Torres, who had previously testified as a witness, on the night of March 3, 1975, for criminal trespass. The prosecution asked Officer Silk whether Torres and the defendant were searched. The officer responded affirmatively and the prosecution asked what was found on Torres. Silk testified that he found two shotgun shells on Torres and one .12 gauge shotgun shell on the defendant. He also testified in response to a question as to the defendant's appearance at that time that the defendant's eyes appeared "bloodshot, reddish, sort of glassy," but that he had no trouble understanding him, his speech was not slurred and he was not staggering. The officer further testified that he observed the defendant the next morning, March 4, 1975, around 2:30 a.m., and he stopped him and questioned him. Officer Silk also responded that at that time the defendant did not seem to have any difficulty moving and he had no speech defects. Officer Silk also observed that his eyes did not appear glassy or red and that the defendant appeared to understand everything Officer Silk said.

Prior to Officer Silk's testimony about the March 3 arrest, defense counsel asked that the jury be excused and he objected on the ground that it was testimony as to prior crimes and its prejudicial effect outweighed its probative value. The state argued that there was no error in admitting the testimony because it went to establishing the defendant's physical condition and state of mind which were the central issues in the trial, and because the

fact of the arrest had already been brought out through Mr. Turcio, Sr.'s testimony, Torres' testimony and the introduction of the appearance bond. The state contended that the testimony about the defendant's possession of the shotgun shell was relevant to proving he had access to his uncle's house and gun collection from which the murder weapon was taken. The court, after the state made its offer of proof, overruled the defendant's objections and allowed Officer Silk to testify as noted above.

The defendant has really raised together two separate claims of error here. They will be addressed separately.

The law as to testimony of prior crimes and misconduct discussed above is applicable to testimony here regarding the criminal trespass arrest and the March 4 nightwalking incident when he was stopped by Officer Silk. In balancing the relevancy and probative value of the testimony against its prejudicial effect; *State* v. *Ralls,* 167 Conn. 408, 417, 356 A.2d 147 (1974); we find that the trial court was not in error in admitting it. The testimony about the arrest for criminal trespass served only as a predicate upon which to base Officer Silk's testimony about his observations of the defendant's physical and mental condition on both the night of March 3, 1975, and again the following morning of March 4, 1975. The defendant had based his defense on the claim that he was intoxicated through drug ingestion when he shot the Massaros on March 5, 1975, and that he had been "high" for the immediately preceding few days. He had interjected the issue of his mental and physical state into the trial through his own testimony, through that of his parents and through the testimony of Robert Torres and David Leary. Thus, Officer Silk's testimony, which described the defendant's physical state within forty-eight hours of the shooting, was relevant to intent, an element of

the crime at issue. *State* v. *Moye,* Conn. (40 Conn. L.J., No. 46, p. 1) (1979); *State* v. *Schaffer,* 168 Conn. 309, 317, 362 A.2d 893 (1975).

Officer Silk had been able to observe the defendant twice during this self-proclaimed "high" period. The relevance of this evidence to disproving the central claim advanced by the defendant is obvious and, clearly, the necessity and probative value of it outweighs any prejudicial impact that an arrest for trespass might have had on the jury. The same is true of the nightwalking incident on March 4. It was offered not to show that the defendant was a bad person, but to contradict the testimony put forth by the defendant's witnesses that he was "high" at the time of the shootings and for a period of days preceding them. It bears reiterating that the issue of intoxication by drugs was the central issue in the case. Therefore, the testimony was relevant and probative and the trial court did not abuse its discretion in allowing it. Moreover, after Officer Silk concluded his testimony, the court gave a cautionary instruction as to evidence of other crimes.

The defendant claims that the testimony about the shotgun shells presents an entirely different aspect of the question of the admissibility of evidence pertaining to prior crimes and misconduct. He directs our attention to this court's recent ruling in *State* v. *Acklin,* 171 Conn. 105, 368 A.2d 212 (1976). There is a fundamental difference between *Acklin* and the case at bar. In *Acklin,* the evidence concerning the defendant's possession of ropes and masks went to the heart of the crimes charged—robbery and conspiracy to commit robbery. Moreover, the prosecution proffered them for the express purpose of proving the conspiracy charge. In the instant case, it was established that the shootings were done with a .32 caliber pistol not the shotgun from which the

shells were taken. According to the state, the testimony was offered to suggest that the defendant had possible access to the murder weapon, not a critical element, since the essential issue in the trial was not whether the defendant shot the victims, which he admitted, but whether he had the physical and mental capacity to form the necessary intent.

The instant case is also distinguishable from *State* v. *Johnson,* 160 Conn. 28, 273 A.2d 702 (1970), on which Acklin was based. As with *Acklin,* the testimony in *Johnson* went directly to establishing a critical and disputed issue in the case—the defendants' access to the dynamite—the means of committing the crime. The state never "connected" the defendants with the dynamite seized. In *State* v. *Ferraro,* 160 Conn. 42, 273 A.2d 694 (1970), this court followed *Johnson,* supra, and remanded for a new trial in a situation where the state offered evidence as to the defendants' possession of guns and ammunition after an armed robbery, but never tied the guns and ammunition in question to the crime with which the defendants were charged. The instant case is distinguishable from the above cases because the testimony was not presented to establish a critical element of the crime, i.e., possession of the instrumentality to commit the crime. Despite this fact, however, it was error to admit the shotgun shell testimony as its claimed relevancy was too remote. The error was harmless, however; see *State* v. *Ralls,* 167 Conn. 408, 417, 356 A.2d 147 (1974); for several reasons: (1) there was no suggestion that the shell came from the murder weapon; (2) possession of a shotgun shell is not a criminal act; (3) possession of a shotgun shell per se is not the type of activity that elicits fear and prejudice from a jury; and (4) there was overwhelming evidence of his guilt. See *State* v. *Williams,* 170 Conn. 618, 634, 368 A.2d 140 (1976).

VI

The defendant next assigns as error the trial court's refusal to grant a mistrial as the result of Officer Nicholas Bencivengo's testimony which the defendant claims prejudicially suggested prior criminal misconduct on the defendant's part. The objected-to testimony, which was ultimately stricken, is as follows: After indicating that he knew the defendant and identifying him, Officer Bencivengo testified:

"Q. [Mr. John T. Redway] Did you have occasion to see him on September 19th of 1974?

A. [Officer Bencivengo] Yes, I did.

Q. Did he have occasion to affix his signature to a document in your presence on that particular day?

A. Yes, he did.

Q. At my request, did you bring a photocopy of that document here today?

A. Yes.

Q. May I see it?

A. (Indicating).

Q. How do you know—how do you recognize that document?

A. I make it a practice on fingerprint cards—I make a practice of putting an X where the accused has to sign his signature.

Q. And is your signature on there also?

A. Yes, it is.

Q. Can you recognize your signature as well?

A. Yes, sir.

Mr. Redway: I'll offer this, your Honor.

Mr. [Barry B.] Johnson: I'm going to ask that the jury be excused again."

The defendant contends on appeal, as he did in the trial court, that Officer Bencivengo's unsolicited reference to "fingerprint cards," set against the background of all the previously admitted other prior crimes testimony, raised the specter of prior criminal misconduct and "infected" the jury to the extent that neither the curative instructions given by the court nor its order to strike the testimony was sufficient to remove the taint. The question of whether the court erred in denying the defendant's motion for a mistrial must, then, focus on Officer Benvicengo's remark in the context of the curative instruction and the granting of the motion to strike. Right after the remark about fingerprint cards, defense counsel asked that the jury be excused and requested a mistrial. The motion for a mistrial was denied, although the court sustained the defendant's objection to the testimony itself. At this point the jury were recalled, and the court in their presence ordered the question and Benvicengo's answer struck. Then the court gave the following curative instructions to the jury: "In your absence, ladies and gentlemen, I have sustained an objection to the testimony the witness Bencivengo was about to offer for your consideration. That was the witness' sole prospective evidential value to you, and he has been withdrawn from the witness stand. The court instructs you to disregard his testimony insofar as his responses may have suggested to you an accusation of crime by the defendant for which he is not charged here. Any such consideration is improper and is not before you and you are instructed to disregard it."

The general principle is that a mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial. *State* v. *Peary,* Conn. (40 Conn. L.J., No. 13, pp. 1, 2) (1978); *State* v. *Ruiz,* 171 Conn. 264, 368 A.2d 222 (1976); *State* v. *Brown,* 169 Conn. 692, 703, 364 A.2d 186 (1975); *State* v. *Rose,* 168 Conn. 623, 635, 362 A.2d 813 (1975). The court has a wide discretion in passing on motions for mistrial. *State* v. *Ruiz,* supra; *State* v. *Rose,* supra; *State* v. *Savage,* 161 Conn. 445, 449, 290 A.2d 221 (1971). In light of the fact that the answer was unresponsive,[5] the fingerprint card was never placed before the jury or admitted into evidence,[6] there was no evidence that the fingerprint card was obtained in conjunction with an arrest rather than with a job; see *State* v. *Ralls,* 167 Conn. 408, 418, 356 A.2d 147 (1974); and the trial court granted the motion to strike and immediately gave the above mentioned curative instruction to the jury, we hold that the trial court properly concluded that there was nothing in the witness' answer which could not be cured by its being stricken and by the instructions to the jury to disregard it. Therefore, it cannot be found that the trial court abused its discretion in not declaring a mistrial. *State* v. *Ruiz,* supra, 274; *State* v. *Brown,* supra, 703.

[5] It is important to note that we are concerned here not with the admission into evidence of a fingerprint record containing incompetent extraneous material; see *State* v. *Ralls,* 167 Conn. 408, 417–18, 356 A.2d 147 (1974); but testimony about a document containing the defendant's signature, which unresponsively was identified as a "fingerprint card."

[6] In questioning the witness, the prosecutor had referred only to a "document" and had not solicited any evidence from Officer Bencivengo about criminal activity on the defendant's part.

[7] Although not raised at the trial level in this form, we are considering this claim because of its constitutional dimensions. *State* v. *Evans,* 165 Conn. 61, 70, 327 A.2d 576 (1973).

VII

The defendant's final assignment of error is that the trial court erred in not suppressing his confession and other statements made after his apprehension because a minor cannot effectively waive a constitutional right without parental advice.[7] In his argument, the defendant candidly admits that he is asking this court to adopt a per se rule that accused individuals under the age of eighteen cannot effectively waive their constitutional rights against self-incrimination, to effective assistance of counsel and to due process of law unless advised by a parent or guardian. We are not persuaded by the defendant's arguments or his interpretation of the rulings of the Supreme Courts of Pennsylvania and Indiana.[8] Instead, we again reaffirm the test laid down in *State* v. *Oliver,* 160 Conn. 85, 94, 273 A.2d 867 (1970), cert. denied, 402 U.S. 946, 91 S. Ct. 1637, 29 L. Ed. 2d 115 (1971): "There is nothing in our law which disqualifies a minor simply because of age from effectively waiving his rights and confessing as the defendant did. It is the totality of the circumstances of the waiver and confession rather than only the age of the defendant which determines whether a waiver of *Miranda* specified rights is valid and effective. 'We cannot accept the suggestion that every minor is as a matter of law incompetent to waive his constitutional rights to remain silent and to an attorney unless the waiver is consented to by a parent or guardian who has himself been advised of the minor's rights. Of course, such adult consent is to be desired. However, whether a minor knowingly and intelligently waived these rights is a question of fact and a mere failure of the police to seek the additional consent of an adult will not outweigh, in any given instance, an evidentially supported finding that such a waiver was actually made.'"

There is no error.

In this opinion the other judges concurred.

[8] *Commonwealth* v. *Smith,* 472 Pa. 492, 372 A.2d 797 (1977), and *Lewis* v. *State,* 259 Ind. 431, 288 N.E.2d 138 (1972).

APPENDIX (2)

Unreported Memorandum of Trial Judge Denying Petitioner's Motion To Suppress

NO. 20235
NO. 20236

STATE OF CONNECTICUT) SUPERIOR COURT
)
VS.) NEW HAVEN COUNTY
)
JOSEPH TURCIO) DECEMBER 12, 1975

MEMORANDUM OF DECISION ON MOTION TO SUPPRESS DEFENDANT'S STATEMENTS.

The crimes charged against the defendant engage a common nexus of fact and were so committed about 8:00 p.m. on March 5, 1975.

The defendant was then over sixteen and one-half years old; his date of birth, August 2, 1958.

The defendant has a tenth-grade education, average educational attainments until he left school, and ability to communicate understandingly in the English language.

On the evening of March 5, about 9:45 p.m., police officer Oren was called to a private home - arriving some five to ten minutes later - by parties there who had apprehended the defendant elsewhere, in another matter, and removed him thence. The defendant had red marks about the face, attributable to rough handling by his keepers; but the defendant told the officer he was all right, medical treatment was neither sought nor given, then or thereafter, and any physical or mental effects did not then or thereafter at any time or occasion material herein affect the defendant's ability to deal normally, knowledgeably and competently with his affairs. While the defendant's father related that, when he

saw the defendant in police custody at the local police station, later that night, in a fleeting glance, he believed he was bleeding, and the father and their lawyer testified that the defendant told them variously that he got the marks two weeks before, or as the result of being pushed into a wall by the police, the court rejects any such finding or conclusion expressly and attributes the nature and origin of such marks as hereinabove; nor indeed does the court take any such recital of police brutality to be seriously pressed.

On the foregoing meeting, officer Oren read the defendant his Miranda rights, arrested him on a discrete charge, relative to this motion, and removed him to the local police station, shortly after 10:00 p.m., there, in the detention area, to repeat the Miranda warnings, again from a printed card, upon the reverse of which the defendant executed a waiver, at 10:15 p.m., writing "Yes" in response to two questions, so to express his understanding of those rights, and his wish to talk to the police, and appending his signature. D's Ex. 1.

During the foregoing contact with the defendant officer Oren had known that he was a suspect in the instant crimes; but there was no exchange between them on this topic.

At about 10:45 p.m., in the detention room, police officer Izzo arrested the defendant in the instant matter, again read him Miranda warnings from another card, and the defendant replied that he understood those rights, that he had already had them read to him, and signed the reverse, blank side of this card, together with the officer and officer Hegg; the defendant

was then taken to the detective room for questioning in this matter.

Interrogation in the instant matter was conducted primarily by officer Izzo, with officer Hegg, and intermittent audition by officer Oren. In its course, the defendant, after approximately five minutes, made the first of two statements at issue, together with markings on a sketch, (D's Ex. 3), and thereafter a third statement, which last was recorded. D's Ex. 4.

This taping was interrupted and curtailed by the arrival of the family lawyer, called by the defendant's father. The record grounds no finding as to whether the defendant ever asked to have his parents present. See State v. Oliver, 160 Conn. 85, 94. The police withdrew and the defendant and the lawyer conferred privately.

Thereafter the lawyer retired for the moment, and the defendant told officers Izzo and Hegg that he did not want to continue, that he would "rather have my lawyer present like I said in the first place;" whereupon the interrogation concluded, and the lawyer conferred again with the defendant.

The defendant did no solicit counsel or express a wish to discontinue questioning until counsel arrived and had conferred with him.

At some time during interrogation in the instant matter, the defendant's clothing was taken, and he was supplied a blanket, until his parents procured a change of clothing at the suggestion of the police. This interlude was not long, and did not expose the defendant to general view or embarrassment or physical distress susceptible of characterization as intimidation or harassment or as physical or mental abuse

or pressure affecting his capacity to deal normally and competently with his affairs, freely and voluntarily.

At the conclusion of interrogation March 5, the defendant was photographed, State's Ex. B, and fingerprinted, and signed the fingerprint card, State's Ex.C, at about 12:30 a.m., March 6.

The defendant's lawyer arrived at the police station at about 11:30 p.m.

In the foregoing time frame, the period of overall custodial interrogation was not long. The initial interrogation and the instant one each engaged not more than two police officers. The defendant made the first statement at issue within five minutes after commencement of interrogation in the instant matter, and within about one hour from the time of his original arrest. Interrogation was neither extensive nor oppressively nor compulsively intensive, nor did it supply the defendant details of the commission of the crime charge.

The following morning, March 6, the defendant and his lawyer solicited an interview with state's attorney Markle at New Haven, and the defendant was brought there for that purpose. The meeting engaged the defendant, his lawyer, state's attorney Markle, and officer Izzo, who brought the defendant to the premises and returned him again thereafter. This interview was also recorded, State's Ex. A, but is not, subject to reservation, addressed by the instant motion.

Thereafter, during the defendant's departure from these premises, he made two more statements to officer Izzo, one at a water cooler, with his lawyer nearby, and then another, as the defendant and the officer were leaving. The defendant initiated both statements, without interrogation

by the officer, except that after the second statement the defendant answered a question as to detail, and the statements were unsolicited, spontaneous and gratuitous.

Upon the foregoing mixed factual and conclusory predicates, the court further concludes ultimately upon the issues of the motion that the defendant was sufficiently apprised of his constitutional privilege against self-incrimination and his right to counsel, consonant with the calls of Miranda v. Arizona, 384 U.S. 436. The defendant queries the adequacy of advice of right to counsel, unless supplemented by police knowledge and advice upon the availability of appointed counsel before interrogation; but this proposed augmentation transcends Miranda, State v. Ralls, 36 Conn. L.J., No 27, pp. 4, 10; State v. Cobbs, 164 Conn. 402, 416-19, and in the instant matter is mooted by effective warnings of rights to silence and to appointed counsel, and by officer Izzo's knowledge that on such request and lack of ready court appointment, interrogation should cease. The warnings so effected March 5 comprehended the occasions of the defendant's two statements to officer Izzo the following morning, March 6, subject of paragraph 5 of the motion. The defendant knew - or, given his capacities hereinafter more particularly noted - reasonably should have known that the warnings given to him by officer Izzo the night before would apply to his statements to the same officer the following morning. Moreover, in the interview immediately preceding those statements, state's attorney Markle had just repeated those warnings, yet again, State's Ex. A. State v. Darwin, 29 Conn. Supp. 423, 428-29 (Super. Ct.).

Further, the court so concludes that the defendant understood his rights to remain silent and to counsel and the presence of counsel during interrogation; that no threats or promises were made to him and no pressure or coercion exercised upon him to induce his accession to interrogation, and that he voluntarily, freely, intelligently and comprehendingly waived those rights on the occasions of his statements herein at issue, being then physically and mentally capable of such understanding and waiver, - those statements comprehending two unrecorded statements March 5; a sketch (D's Ex. 3); a recorded statement March 5 (D's Ex. 4); and the two unrecorded statements March 6, subject of paragraph 5 of the motion. State v. Bartee, 36 Conn. L.J., No. 21, p. 1; State v. Cobbs, supra, at 515-16, 419-22; State v. Cofone, 164 Conn. 162, 168-69; State v. Oliver, supra, 93. In these ultimate conclusions the court has taken into consideration the totality of the circumstances, including but not limited to the defendant's age, Oliver at 94; note, 87 A.L R.2d 624, and his experience of receiving Miranda warnings on two prior occasions in 1973, State v. Cobbs, supra, 421. The defendant would have it that he has been given to ingestion of drugs for some period of time, and that on the occasions of his statements March 5-6 he was sufficiently under the influence of drugs to negate the foregoing conclusions of effective waiver. While he had drugs on his person when arrested, and may be a drug user, the court in its conclusions has credited the testimony of the participating police officers as to his normal appearance and conduct, alertness and understanding, subject to

understandable but not incapacitating fatigue toward the close of proceedings March 5, together with the following corroborating considerations. His photograph, State's Ex. B, does not display any perceptible aberrancies from normalcy, in particular the alleged conditions of drooping eyelids and stance. His writing on the Miranda cards, Def's Exs. 1 & 2, and on his fingerprint record, State's Ex. C, are not markedly or significantly aberrant from exemplars of his signatures on other and presumably normal or unaffected occasions, D's Exs. 5-7; the signature on D's Ex. 2 is something of a scribble, but it is bracketed by those on D's Ex. 1 and State's Ex. C, relatively indistinguishable from the proffered exemplars, and none in any event to be taken to ground the defendant's waiver as ineffectual. Moreover, the court has twice audited the taped statement of March 5, D's Ex. 4, and once the recorded statement of March 6, State's Ex. A, together with transcripts considered only as aids to audition, and has so considered both records for both content and delivery of defendant's remarks. According to the defendant's lawyer, the defendant seemed relatively all right the morning of March 6, in state's attorney Markle's office, was in possession of his faculties, responsive and coherent, with responses consistent but not entirely credible, and the defendant's parents thought the March 6 record better than March 5. Yet, the court concludes that the defendant's coherence and speech pattern are, if anything, relatively better in the March 5 record than in the March 6 record, and that in any event the defendant responded to questions in the March 5 record

intelligently and comprehendingly, with coherent and responsive answers. In this vein, for example, the court is particularly impressed with the understanding and reflective terms in which the defendant paused and expressed the difficulty of responding directly to a critical question, when this exchange is taken in the context of his other statements. There is also to be considered his facility in terminating further interrogation March 5, after colloquy with counsel. Finally, the defendant would have his speech characterized as thick, slurred, not normal; albeit the police officers disagreed, and to the defendant's counsel that meant trailing off, not diction, which was clear. The court finds and concludes no signal slurring or abnormality of speech pattern, evocative of inference of disability in terms of effective waiver. In this light the phrasing, articulation and clarity are good, and the speech is slangy rather than notably slurred, albeit vernacular rather than classical; but not adversely reflective upon effective waiver.

In this particular regard, as to the unrecorded statements of March 6, State v. Darwin, supra, is distinguished, as to adequacy of warnings and the lack of expectable confidentiality of the statements, 29 Conn. Sup. at 430-31, and as to presence of counsel, immediately following the recorded interview sought by the defendant and counsel with the state's attorney, at which Miranda warnings were yet again repeated. Given the repetitive warnings and setting, the state cannot reasonably be expected to turn a deaf ear to statements gratuitously proffered under effective waiver. Miranda, supra, 478; State v. Bartee, supra, 3.

With respect to the discontinuance by the defendant of recorded statement on March 5, when the defendant conferred with counsel and then in a resumption of recordation terminated the interrogation, stating that he would "rather have my lawyer present, like I said in the first place;" the court concludes that the defendant had not theretofore requested in course of interrogation that it be terminated, consonant with the testimony of the police officers, and that the quotation is consistent with officer Hegg's recollection of a statement in that vein in the unrecorded interlude after the arrival of counsel, when interrogation had then in fact terminated.

The time interval between arrival of counsel at the police station and his introduction to the defendant during the recordation of a March 5 statement has been particularly considered, in the light of the fact that the tape runs some seven and one-half minutes from the beginning to the knock on the door introducing counsel to the room, and the defendant's proffer that the time between arrival of counsel at the station and his introduction to the defendant could have been as long as fifteen minutes. However, the defendant's evidence also variously estimated that interval otherwise from ten minutes plus, to seven minutes, down to six minutes. Recognizing stressful circumstance, certain collateral discrepancies and counsel's fine relation with the police, the court credits that he was immediately recognized by officer Heck, on duty at the reception desk, who walked without delay a short distance to an inner foyer, adjacent to the reception foyer, there announced his

arrival to deputy police chief Hubbard, who so advised the chief and Mr. Markle in the adjacent office, and was promptly advised his admission, effected in a matter of seconds, so that any delay entailed only Mr. Markle's explanation of the charges thereafter and counsel's comment, before counsel was led directly to the defendant, a matter of three to five minutes, at a time when the defendant himself had waived and not requested counsel, and neither he nor his interrogating police officers knew that counsel was coming or had already arrived at the station. Counsel on admission from the outer foyer had advised the police that interrogation should cease; but there was no deliberate or significant delay from then until he was ushered down the hall to the defendant.

The state accordingly has satisfied its burden of proving the voluntariness of the statements at issue, by at least a fair preponderance of the evidence, Bartee, supra, at 3, and the motion is denied.

/s/ McCarthy, J.

Supreme Court, U. S.
FILED
DEC 7 1979
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In The
Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-449

JOSEPH TURCIO, *Petitioner*

v.

STATE OF CONNECTICUT, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RESPONDENT
State of Connecticut

ERNEST J. DIETTE, JR.
Assistant State's Attorney
Office of the
Chief State's Attorney

STATEMENT OF ISSUES

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I. Whether the determination of the Supreme Court of the State of Connecticut, that the trial court's jury charge on the particular care to be given to the testimony of certain witnesses bearing a special relationship to the defendant was not favored but did not constitute harmful error, provides this Court with a federal question of substance? 2

II. Whether the defendant's attempt to have this Court adopt a per se rule with regard to the need for the presence of a parent, attorney or guardian before a juvenile may waive his *Miranda* rights should fail in light of this Court's recent decision of *Fare v. Michael C.*, _____ U.S. _____, 99 S.Ct. 2560 (1979) which, on a similar set of facts, rejected the per se approach to this issue, in favor of a "totality of the circumstances" test? 5

CONCLUSION 7

STATEMENT OF THE CASE

The Respondent does not contest the statement of the case as set forth in the Brief of the Petitioner, pp. 3-10.

ARGUMENT

I. THE DETERMINATION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT, THAT THE TRIAL COURT'S JURY CHARGE ON THE PARTICULAR CARE TO BE GIVEN TO THE TESTIMONY OF CERTAIN WITNESSES BEARING A SPECIAL RELATIONSHIP TO THE DEFENDANT WAS NOT FAVORED BUT DID NOT CONSTITUTE HARMFUL ERROR, DOES NOT PROVIDE THIS COURT WITH A FEDERAL QUESTION OF SUBSTANCE.

Without in any way attempting to urge this Court to approve the "particular care" charge which the Supreme Court of the State of Connecticut has already found to be "inappropriate" and something to be "discouraged" (see Opinion, p. 7a of The Appendix to Petitioner's Brief), the Respondent would respectfully submit that the Petitioner has simply failed to state a claim, herein, which even remotely resembles one of constitutional dimension or substance.

Petitioner's misapprehension of the purpose of the Writ of Certiorari can be readily observed from his failure to cite a single federal District Court or Court of Appeals decision in this first portion of his Brief. That Argument, likewise, is devoid of a single reference to precisely which constitutional rights he has been denied by the trial court's charge here, as well as the state Supreme Court's decision thereon.

The weakness of Petitioner's first argument can be readily gleaned from his claim that the appellate courts of **three states**, to wit: Washington, Minnesota and North Carolina (see p. 12 of Petitioner's Brief) have condemned a similar charge. Indeed, it may properly be

said now, in light of the decision in *State v. Turcio,* Conn. (40 Conn. L.J. No. 52, p. 4. June 26, 1979), that the *State of Connecticut* also disapproves and discourages the giving of such a charge. None of this means, of course, that the Petitioner has cited a claim of constitutional substance, cognizable by this Court as a matter requiring uniform, federal determination.

Rather, the Supreme Court of Connecticut acted as a state court in determining that the charge in Petitioner's case, when read as a whole, had deprived him of no state or federally protected right.

The charge used in the present case was no more significant, constitutionally, than that allowed by Oregon's statutory "Every witness is presumed to speak the truth"--charge in *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

In *Cupp v. Naughten*, supra, 94 S.Ct. at p. 400, this Court ruled:

> "...Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is **undesirable, erroneous, or even "universally condemned,"** but that it violated some right which was guaranteed to the Defendant by the Fourteenth Amendment.
>
> In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd v. United States*, 271 U.S. 104, 107, 46 S.Ct. 442, 443, 70 L.Ed. 2857 (1926). While this does not mean that an instruction by itself may **never** rise to the level of constitutional error,

see *Cool v. United States*, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." (emphasis added)

The Supreme Court of Connecticut, in *State v. Turcio*, supra, has weighed the entire charge to the jury with the one, brief reference to the "particular care" to be given to certain of the defendant's witnesses, and ruled that same are "inappropriate and should be discouraged" but the Petitioner was not harmed by the charge, in light of the fact that the jury had already been instructed elsewhere in the charge that in weighing the credibility of **all witnesses** they could consider the ordinary factors that might affect recollection or produce bias. (See p. 7a of the Appendix to Petitioner's Brief).

In his Brief before this Supreme Court, the Petitioner has not suggested a single, substantial constitutional right he has denied by the lone paragraph culled from the court's lengthy charge here, nor has he cited a single federal District Court or Circuit Court of Appeals decision addressing this issue in constitutional terms.

With this state of the record, there is no reason to believe that this Court will exercise its discretion and accept this Argument as one needing a uniform, federal and constitutional resolution.

II. THE DEFENDANT'S ATTEMPT TO HAVE THIS COURT ADOPT A PER SE RULE WITH REGARD TO THE NEED FOR THE PRESENCE OF A PARENT, ATTORNEY OR GUARDIAN BEFORE A JUVENILE MAY WAIVE HIS *MIRANDA* RIGHTS MUST SURELY FAIL IN LIGHT OF THIS COURT'S RECENT DECISION OF *FARE V. MICHAEL C.*, _____ U.S. _____, 99 S.CT. 2560 (1979) WHICH, ON A SIMILAR SET OF FACTS, REJECTED THE PER SE APPROACH TO THIS ISSUE, IN FAVOR OF A "TOTALITY OF THE CIRCUMSTANCES" TEST.

In light of this Supreme Court's recent decision in *Fare v. Michael C.*, _____ U.S. _____, 99 S.Ct. 2560 (decided June 20, 1979 – i.e., within one week of the decision by the Supreme Court of the State of Connecticut in *State v. Turcio*, supra, decided June 26, 1979) there is no reason to believe that the issue Petitioner seeks to raise would be one which the Court would deem worthy of certiorari consideration.

In *Fare*, supra, the issue presented was virtually identical to that presented in *State v. Turcio*, supra. The defendents were aged sixteen (in *Turcio*) and sixteen and one-half (in *Fare*). In *Fare*, the Petitioner sought to create a per se rule with regard to a juvenile's request to speak to a probation officer. In *Turcio*, the Petitioner seeks a per se rule with regard to a juvenile's request to be allowed to speak with his parents prior to waiving his so-called *Miranda* rights. The Supreme Court of Connecticut determined this issue adversely to the Petitioner after employing a "totality of the circumstances" test.

In *Fare*, supra, 99 S.Ct. at p. 2573, this Court ruled as follows:

"...We hold, in short, that the California Supreme Court erred in finding that a juvenile's request for his probation officer was a per se invocation of that juvenile's Fifth Amendment rights under *Miranda*. We conclude, rather, that whether the statements obtained during subsequent interrogation of a juvenile who has asked to see his probation officer, but who has not asked to consult an attorney or expressly asserted his right to remain silent, are admissible on the basis of waiver remains a question to be resolved on the **totality of the circumstances** surrounding the interrogation. On the basis of the record in this case, we hold that the juvenile court's finding that respondent voluntarily and knowingly waived his rights and consented to continued interrogation, and that the statements obtained from him were voluntary, were proper, and that the admission of those statements in the proceeding against respondent in juvenile court was correct." (Emphasis added)

In the present case, as Petitioner's Brief, p. 22 concedes, the trial court found that the record did not indicate whether the defendant had asked to talk to his parents or not. Furthermore, the entire issue of a per se right to have the minor's parents present before an effective, voluntary waiver of his *Miranda* rights could be found was never raised before the trial court. Since (as Petitioner's Brief, p. 21, again, concedes) the record also demonstrates that the sixteen-year-old Petitioner was advised of his *Miranda* rights at least **three times** on the night of his arrest; was allowed consultation with his attorney (Mr. Dahlmeyer) as soon as the latter arrived at the police station during the questioning; and made certain incriminating statements shortly after being transported to the police station, rather than after any prolonged interrogation, there is no reason to believe that the trial court erred in finding that Petitioner's statements were voluntarily given or that the

Supreme Court of the State of Connecticut erred in upholding that lower court determination, after applying a "totality of the circumstances," rather than a "per se," test to the facts of Petitioner's case.

CONCLUSION

The decision of the Supreme Court of the State of Connecticut does not contravene any substantive rights of the Petitioner. His claims do not rise to the level of constitutional dimension and, thus, it is respectfully requested that the Petition be denied. *Duncan v. Tennessee*, 405 U.S. 127, 92 S.Ct. 785. 31 L.Ed.2d 86 (1972).

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